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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 251

WALTER H. DUISBERG,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

EUGENE L. GAREY,
Counsel for Petitioner.

JOHN MILTON,
DANIEL F. COHALAN, JR.,
ABRAHAM HORNSTEIN,
Of Counsel.

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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States,—

Your petitioner respectfully shows:

Statement of the Matter Involved

Petitioner sues in the Court of Claims to recover just compensation for 1,975 shares of the capital stock of General Dyestuff Corporation, a New York corporation, which the United States, by its Alien Property Custodian, took and appropriated to its own use on June 30, 1942 (R. 1-4).

It is admitted by the demurrer below that petitioner is a loyal American citizen and was the sole and absolute

owner and holder of record of said property on the date of its seizure (R. 1, 3).

On May 29, 1943, petitioner filed with the Alien Property Custodian a claim, under § 9(a) of the Trading with the Enemy Act, for the return of said property, but made no request for a hearing on the claim (R. 2).

On June 5, 1943, petitioner commenced an action in the District Court for the District of New Jersey against the Alien Property Custodian, under § 9(a) of the Trading with the Enemy Act, seeking the return of said property. On March 18, 1944, the Alien Property Custodian filed his answer (R. 2).

After various motions addressed to the pleadings, and before the date set for commencement of the trial, petitioner, on June 20, 1944, moved for a voluntary nonsuit. Petitioner's motion was denied and, on motion of the Alien Property Custodian, the court, without any trial upon the merits, ordered that petitioner's action be dismissed with prejudice, and, on June 22, 1944, entered an order to that effect (R. 2).

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit, which affirmed the order. An application by petitioner for a writ of certiorari was denied by this Court (R. 2-3).

Petitioner thereupon brought this action in the Court of Claims. Respondent, on August 9, 1948, filed a general traverse. On August 12, 1949, respondent withdrew its traverse and moved to dismiss the petition. The court below, in dismissing the petition, rested its decision on the ground that it does not have jurisdiction of the cause of action (R. 4, 7-12).

Petitioner, admittedly a loyal American citizen, without ever having had a trial upon the merits has been denied, in all courts, the opportunity to prove his right either to the return of his property or to compensation for its seizure.

He now applies to this tribunal of last resort to grant him his day in court.

Relevant Parts of Statutes Involved

Article 5 of the Amendments to the Constitution of the United States provides:

> "* * * nor shall private property be taken for public use, without just compensation."

Section 1491, Judiciary and Judicial Procedure (28 U. S. C.) provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> "(1) Fo[illegible]l upon the Constitution; or * * *
>
> "(4) Founded upon any express or implied contract with the United States; * * *."

The fourth paragraph of § 7(c) of the Trading with the Enemy Act (50 U. S. C. App.) provides:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act * * *."

Section 9(a) of the Trading with the Enemy Act (50 U. S. C. App.) provides:

> "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the

United States for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * *."

Jurisdictional Statement

1. The judgment of the Court of Claims dismissing plaintiff's petition was entered on June 5, 1950 (R. 12).

2. The jurisdiction of this Court is invoked under § 1255 (1), Judiciary and Judicial Procedure (28 U. S. C.).

3. It is submitted that the Court of Claims has decided a question of general importance and of substance relating to the construction and application of the Constitution and of several statutes of the United States, which has not been, but should be, settled by this Court; and that the Court of Claims has not given proper effect to certain applicable decisions of this Court.

Question Presented

Does the Court of Claims have jurisdiction to render judgment upon a claim against the United States to recover just compensation for private property taken for public use, where the property was mistakenly seized by the Alien Property Custodian in the belief that he was authorized to seize it by virtue of the Trading with the Enemy Act?

Reasons Relied upon for Allowance of Writ

1. The Court of Claims was in error in predicating its decision on the doctrine of *Lynch* v. *United States*, 292 U. S. 571, 78 L. ed. 1434 (1934). Petitioner expressly recognized and conceded in the Court of Claims that Con-

gress has the power to abolish said court or to limit its jurisdiction. In predicating its decision upon the *Lynch* case, the lower court was setting up and overthrowing a straw man. Petitioner's contention in the court below was that by the Trading with the Enemy Act *Congress had not sought* to limit the jurisdiction of the Court of Claims to award just compensation for property taken by the Alien Property Custodian. On that point, in *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 79-80, 80 L. ed. 54, 59-60 (1935), this Court stated:

> "The implication that by the appropriation of private property to public use the United States undertakes to make *just compensation* for it [cases cited] must likewise enter into the construction of a statute giving to a non-enemy *a remedy* for the seizure of his property as a war measure.
>
> "*Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution.*"[1]

2. The Court of Claims misinterpreted the decision and the opinion of this Court in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 92 L. ed. 88 (1947). This Court did not therein hold or imply that the jurisdiction vested in the District Courts to return to a claimant property seized by the Alien Property Custodian impliedly repealed the jurisdiction previously vested in the Court of Claims to render judgment for just compensation for the property so seized. This Court there said (at 487-488):

> "Our hesitation is, moreover, increased when we note that § 7(c) makes the remedy under the Act the only one Congress has granted a claimant. It is not

[1] All italics in this petition and brief are supplied by the undersigned except where otherwise noted.

easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, *leaving them only with such remedy as they might have under the Fifth Amendment.*"

Prayer for Writ

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Claims, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Court of Claims had in the case numbered and entitled on its docket No. 48727, Walter H. Duisberg, plaintiff, v. The United States, defendant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said Court of Claims be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: August 16, 1950.

Respectfully submitted,

EUGENE L. GAREY,
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JOHN MILTON,
DANIEL F. COHALAN, JR.,
ABRAHAM HORNSTEIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 251

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THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion rendered by the United States Court of Claims, on June 5, 1950, has not been officially reported. The opinion is printed in full in the record (R. 3-12).

Jurisdiction

The "Jurisdictional Statement" in the preceding petition is hereby adopted and made a part of this brief.

Statement of the Case

The "Statement of the Matter Involved" in the preceding petition is hereby adopted and made a part of this brief.

Specification of Error

The Court of Claims erred in holding that it does not have jurisdiction to render judgment upon a claim against the United States to recover just compensation for private property taken for public use, where the property was mistakenly seized by the Alien Property Custodian in the belief that he was authorized to seize it by virtue of the Trading with the Enemy Act.

ARGUMENT

Summary of the Argument

The Court of Claims predicated its decision upon the doctrine of *Lynch* v. *United States,* 292 U. S. 571, 78 L. ed. 1434 (1934), apparently under the misapprehension that the problem before it was whether Congress has the power to limit the jurisdiction of the Court of Claims. No such problem was before the Court of Claims, petitioner having clearly recognized and conceded that that power does reside in Congress.

The actual problem before the Court of Claims, which is not analyzed at all in its opinion, was whether Congress, by giving the owner of property seized by the Alien Property Custodian the right to compel return of the property itself, *intended* to revoke *pro tanto* the previous conferral upon the Court of Claims of jurisdiction to render just compensation for seizure of private property by the United States.

The opinion of the Court of Claims talks all around this issue—the only issue in the case—without once coming to grips with it.

In analyzing the significance of § 7(c) of the Trading with the Enemy Act, the opinion of the Court of Claims recites it as follows (R. 10):

> " 'The *sole relief* and *remedy* of any person * * * shall be that provided by the terms of this Act * * *.' " [Italics supplied by the Court of Claims.]

The actual language of the Act is:

> "The sole relief and remedy of any person *having any claim to any money or other property* * * * *transferred* * * * *to the Alien Property Custodian* * * * shall be that provided by the terms of this Act * * *." [Italics supplied by the undersigned.]

Petitioner's thesis is simple and can best be illustrated by a hypothetical case: The United States seizes a cargo of fresh fish which the Alien Property Custodian mistakenly believes to belong to an alien enemy, although it actually belongs to a loyal American citizen. At the moment of seizure the property is worth $10,000. A week later, when the property has declined to a value of $100 (as fertilizer), The Alien Property Custodian recognizes his error and returns the fish.

Does the owner have a claim to secure just compensation for the seizure, under the Fifth Amendment and 28 U. S. C. § 1491, or does the return of the fish, now worth only 1% of its value at the date of seizure, completely satisfy the obligation of the government under all applicable statutes?

In other words, was the remedy of return of the property itself, afforded by § 9(a) of the Trading with the Enemy Act, intended as a *substitute* for the pre-existing remedy of just compensation, or was it intended as an *additional* remedy available to owners in those instances where their interests might be better served by compelling a return of the property itself?

Did Congress, in the Trading with the Enemy Act, in unmistakable language abrogate with respect to a single class of cases (to wit, property taken by the Alien Prop-

erty Custodian) the pre-existing jurisdiction of the Court of Claims to award just compensation for property seized by the United States?

Point I

Certiorari should be granted because of the inconsistent position heretofore taken by the government in the very case at bar upon the question here presented.

In arguing before the Court of Claims, respondent persisted in attributing erroneous significance to petitioner's analysis of the inconsistent position heretofore taken by the government in the very case at bar upon the question here presented.

Petitioner does *not* contend that there is any principle of equitable estoppel at work in the instant situation which would "estop" the government to deny the jurisdiction of the Court of Claims in the case at bar. Petitioner is well aware of the fact that jurisdiction cannot be conferred upon a court by "estoppel."

If, therefore, this Court be of opinion that it has already, in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 92 L. ed. 88 (1947), decided adversely to petitioner the question here presented, then manifestly certiorari should be denied. But petitioner believes that the *Uebersee* case did not decide anything of the kind; in fact, that this Court there indicated an opinion precisely contrary to that attributed to it by the Court of Claims (see *infra,* Point III).

If, on the other hand, this Court did not, in the *Uebersee* case, decide the question here presented, then the inconsistent position heretofore taken by the government in the very case at bar clearly calls for the granting of certiorari.

At no point prior to the making of its motion in the Court of Claims to dismiss the instant petition has the

government taken the position that the Court of Claims does not have jurisdiction of the claim at bar. To the contrary, the government has maneuvered petitioner into his present unhappy situation by previously taking the position in other courts that petitioner *does* have a remedy under the Tucker Act and that the Court of Claims *does* have jurisdiction of the claim at bar.

Thus, in a brief submitted by the government before Judge Fake in support of motions to dismiss the complaint in the antecedent action brought by petitioner against the Alien Property Custodian in the United States District Court for the District of New Jersey—a brief subscribed by A. Matt. Werner, General Counsel to the Alien Property Custodian, Charles M. Phillips, United States Attorney for the District of New Jersey, George A. McNulty, Chief of the Alien Property Unit of the Department of Justice, and Louis P. Haffer, Attorney, Department of Justice—the government contended as follows:

> "*Plaintiff has an adequate remedy for compensation in the Court of Claims.*
>
> "Besides the administrative remedy authorized by the Act and provided by the Custodian, *the plaintiff has a plain and adequate remedy for compensation in the Court of Claims.*
>
> "As we have seen, the Trading with the Enemy Act as now amended is a requisition or condemnation statute in so far as it plainly authorizes the taking of property, for which, under the Constitution, just compensation must be paid. We have further seen that a congressional promise to pay compensation will be presumed from the authorization itself. *Becker Steel Co.* v. *Cummings, supra* [296 U. S. 74 (1935)], *Yearsley et al.* v. *W. A. Ross Construction Co.*, 309 U. S. 18 (1940), and *Hamburg American Co.* v. *United States*, 277 U. S. 138 (1928), overruling the Court of Claims in *Deutsche-Australische Damofechiefa Gesellschaft* v. *United States*, 59 C. Cls. 450.

"A necessary implication of the decision in the Becker Steel case is that an American citizen whose property had been erroneously seized as enemy property under the old Trading with the Enemy Act had an adequate remedy for compensation in the Court of Claims under the Tucker Act. Statements by the courts in earlier cases arising under the original Trading with the Enemy Act to the effect that there was no right of recovery except that provided by Section 9(a) must be read in the light of the decision of the court in the Becker Steel case.

"Moreover, they must be considered against the background of the narrow powers conferred by the old Trading with the Enemy Act, which authorized the seizure only of enemy property for which no compensation was required to be paid. The authority conferred in Section 5(b), as amended, extends, as we have seen, to vesting at least some kinds of property for which compensation must be paid. Finally the careful provisions in the regulations of the Alien Property Custodian for administrative review of his actions taken under Section 5(b) as amended were promulgated pursuant to congressional authority and negative a tortious taking, and *the Vesting Order itself states that it shall not be deemed to indicate that compensation will not be paid.*

"The circumstance that Section 5(b) as amended does not provide for payment in advance of taking is immaterial and raises no constitutional objection. *Joslin Manufacturing Co.* v. *City of Providence,* 262 U. S. 668 (1923); *Hurley* v. *Kincaid,* 285 U. S. 95 (1932); *Moody* v. *Wickard,* 136 F. (2d) 801, 803 (C. A. D. C., 1943); *In re Inland Waterways,* 49 F. Supp. 675 (1943).

"Similarly immaterial, despite plaintiff's suggestion to the contrary, is the absence of any express authority in Section 5(b) to institute suit in the Court of Claims. The existence of an obligation to pay by implication affords the claimant the right to a remedy in such court despite legislative silence. *Jacobs* v. *United States, supra; Phelps* v. *United States,* 274

U. S. 341 (1927); *United States* v. *Cress*, 243 U. S. 316 (1917).

"Consequently, if the plaintiff qualifies as a person who, though a 'national' within the meaning of the statute, is entitled to compensation for the acts complained of, there are adequate administrative and judicial remedies available by which to recover that compensation."

When petitioner appealed to the United States Circuit Court of Appeals for the Third Circuit from the District Court's dismissal of his complaint, the bench, during the course of oral argument, asked Irving J. Levy, Chief Trial Attorney appearing on behalf of the government, what remedies would be open to petitioner were the court to affirm the dismissal below. Mr. Levy unequivocally replied that petitioner would be left with two remedies—an administrative hearing and a suit under the Tucker Act in the Court of Claims (R. 11-12).

It is not an unfair assumption that the Circuit Court's motivation in addressing that question to government counsel was that the answer thereto might affect its determination of the question before it. Nor is it an unfair assumption that the Circuit Court might not have affirmed had it not been told by government counsel that petitioner had another judicial remedy available to him.

The government, having succeeded in upholding the dismissal of the antecedent action brought against the Alien Property Custodian by taking the position that petitioner *does* have another judicial remedy available to him in the Court of Claims, has now turned about and procured the dismissal of the Court of Claims petition by asserting that there is no such remedy available to petitioner.

The inconsistent position heretofore taken by the government in the very case at bar manifestly requires that this Court grant certiorari in order to determine on which

occasion government counsel were in the right—when they persuaded the Circuit Court to dismiss petitioner's antecedent action for the return of his property, or when they persuaded the Court of Claims to dismiss petitioner's present action for just compensation.

If this Court has not already decided, in the *Uebersee* case, the question here presented—and petitioner respectfully submits that it has not—then the situation urgently merits the granting of certiorari by this Court, lest petitioner be left remediless, with access to all courts denied him, as a result of the government's change of position in the very case at bar.

Point II

The position that the Court of Claims has jurisdiction of a claim such as that at bar, heretofore taken, in a vast number of cases, by experienced, intelligent and sincere government counsel, merits the respectful attention of this Court and warrants the granting of certiorari to determine whether government counsel were correct in their previous position or whether they are correct in their present position.

Once more it should be made clear at the outset, as was done at the beginning of Point I, *supra*, that if the *Uebersee* case has already decided the question here presented, then government counsel are subject to no criticism for reversing their position when arguing the case at bar in the Court of Claims. It is the duty of counsel to call a court's attention to a controlling decision by the highest court in the land, despite the fact that that decision may be contrary to their own prior opinion.

But if this Court did *not* decide, in the *Uebersee* case, the question here presented, then the opinions previously expressed by government counsel in a vast number of cases

in addition to the case at bar, should be persuasive upon the problem presently before this Court.

The government counsel who have heretofore expressed the opinion, in numerous courts, that the Court of Claims *does* have jurisdiction of a claim such as that at bar, are counsel who are well versed in this problem.

Even if this Court had, by dictum in the *Uebersee* case, indicated a belief that the Court of Claims lacks jurisdiction of a claim such as that at bar, petitioner would nevertheless respectfully urge that this is one of those rare cases where the opinions heretofore voiced by scores of eminent government counsel warrant reexamination by this Court of the belief thus expressed by it.

A fortiori where—as petitioner believes (see *infra*, Point III)—this Court's dictum indicates an attitude precisely contrary to that ascribed to it by the opinion below (R. 11), the views voiced by eminent government counsel up to the very day of this Court's ambiguous dictum in the *Uebersee* case clearly warrant the granting of certiorari.

Among the many cases (in addition to the case at bar) in which the government has heretofore taken the position that the Court of Claims *has* jurisdiction of a claim for just compensation for property seized by the Alien Property Custodian are:

Swiss Bank Corporation v. *Clark*, 73 F. Supp. 896 (D. C. S. D. N. Y. 1947);

Uebersee Finanz-Korporation v. *Markham*, 158 F. 2d 313 (C. A. D. C. 1946), aff'd *sub nom. Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 92 L. Ed. 88 (1947);

Draeger Shipping Co., Inc. v. *Crowley*, 49 F. Supp. 215 (D. C. S. D. N. Y. 1943); and

Castell v. *United States*, 20 F. Supp. 175 (D. C. S. D. N. Y. 1937), rev'd 98 F. 2d 88 (C. C. A. 2d, 1938).

The opinion below recognizes that in each of the foregoing cases "the Government took the position that plaintiffs had a remedy under the Tucker Act and thus the Court of Claims had jurisdiction of a suit for just compensation" (R. 11).

In the *Swiss Bank* case, *supra*, the court noted (at 898):

> "It is further contended [by the Alien Property Custodian] that, if plaintiff is entitled to any relief or compensation for the property seized, it can recover therefor under the Tucker Act, 28 U. S. C. A. § 41(20), if it shows itself to be a friendly alien."

In the *Uebersee* case, *supra*, the court noted (at 314):

> "To avoid conflict with the constitutional prohibition against the taking of property of friendly aliens without just compensation, which such a construction would raise, the Custodian suggests that appellant may obtain just compensation by way of suit against the United States in the Court of Claims."

In the *Draeger* case, *supra*, the court noted (at 218):

> "The defendant [Alien Property Custodian] argues that the Court of Claims has jurisdiction to decide claims against the government and also that the law implies a promise on the part of the government to make compensation for private property appropriated by it for public use, which is enforceable by the courts."

Among the many eminent counsel who have, in the above-cited cases, propounded on behalf of the government the view that the Court of Claims *does* have jurisdiction to entertain the claim at bar are:

> John F. Sonnett, Assistant Attorney General;
> Herbert Wechsler, Special Assistant to the Attorney General;
> Harry LeRoy Jones, Special Assistant to the Attorney General;
> Frederick J. Rita, Special Assistant to the Attorney General;

A. Matt. Werner, General Counsel to the Alien Property Custodian;

Lamar Hardy, United States Attorney for the Southern District of New York;

Mathias F. Correa, United States Attorney for the Southern District of New York;

John F. X. McGohey, United States Attorney for the Southern District of New York;

George A. McNulty, Chief of the Alien Property Unit of the Department of Justice;

George B. Searls, Chief Trial Attorney;

George W. Jansen, Chief Trial Attorney;

Wallace H. Walker, Attorney, Department of Justice;

Lawrence H. Axman, Assistant United States Attorney for the Southern District of New York; and

Irvin C. Rutter, Assistant United States Attorney for the Southern District of New York.

The views of the foregoing eminent counsel merit the respectful attention of this Court and warrant the granting of certiorari to determine whether they were correct in the position taken by them in the above-cited cases or whether present government counsel are correct in their present position.

Point III

The dictum of this Court in the Uebersee case and the opinions expressed by other courts and authorities recognize the jurisdiction of the Court of Claims to entertain the claim at bar. At the very least, they indicate that this is a situation warranting certiorari so that this Court may determine this important question.

In *Uebersee Finanz-Korporation* v. *Markham*, 158 F. 2d 313 (C. A. D. C. 1946), the majority opinion held that the Trading with the Enemy Act affords a remedy against the Alien Property Custodian in the case of seizure of property of a Swiss citizen pursuant to § 5(b) of the Act.

Mr. Justice Edgerton disagreed with the majority view, but pointed out that his disagreement would not leave plaintiff remediless, since plaintiff would still have available to it a remedy under the Tucker Act.

Mr. Justice Edgerton's dissenting opinion points out that even if a Swiss citizen be denied the relief (under the Trading with the Enemy Act) of return of the property itself, there would still be available to such neutral the remedy (under the Tucker Act) of compensation for the property seized.

In this connection, Mr. Justice Edgerton stated (at 316):

> "Compensation for the taking of the property is a different matter. The Tucker Act, 28 U. S. C. A. § 250, permits recovery in the Court of Claims on any claim 'founded upon the Constitution of the United States or any law of Congress * * * [or] upon any contract, express or implied, with the Government of the United States * * *.' And 'it is settled by many decisions of which we need only cite the last—*Yearsley* v. *W. A. Ross*, 309 U. S. 18, 60 S. Ct. 413, 84 L. Ed. 554—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is "just compensation" under the Fifth Amendment.' *Silesian-American Corporation* v. *Markham*, 2 Cir., 156 F. 2d 793, 797.
>
> "The former owner's claim to compensation is not affected by the provision in § 7(c) that 'the sole relief and remedy of any person having any claim to any money or other property * * * transferred' shall be that provided by the Act, since *a claim to compensation for the taking of property is not a claim to the property.*"

This Court affirmed the determination below *sub nom. Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 92 L. Ed. 88 (1947). Undeniably, the language of this Court on the question of the availability of the Tucker Act remedy

was ambiguous. But to the extent to which this Court did express itself, petitioner believes that it indicated recognition of the existence of the Tucker Act remedy.

In the course of its opinion, this Court stated (at 487-488):

> "Our hesitation is, moreover, increased when we note that § 7(c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, *leaving them only with such remedy as they might have under the Fifth Amendment.*"

In the foregoing two consecutive sentences, this Court notes the "exclusiveness" of the § 7(c) remedy and then apparently proceeds to recognize that the remedy available to non-enemies under the Fifth Amendment to the Constitution (and 28 U. S. C. § 1491) has not been eradicated.

It would appear pointless for petitioner to attempt to tell this Court what it meant by its above-quoted dictum in the *Uebersee* case. But whatever this Court may have meant by the foregoing dictum, the Court of Claims seriously handicapped itself in its search for the meaning of this Court's expression of opinion when it recognized the existence only of the first sentence in the foregoing quotation and *completely ignored the second sentence* (R. 11).

Furthermore, whatever interpretation this Court's dictum may be subject to, this Court most certainly did not *decide*, in the *Uebersee* case, the question here presented. The opinion below, while it is somewhat selective in its reading of what this Court has "spoken" on the instant subject, recognizes that this Court has not *decided* the question at bar (R. 12).

It would appear that on a substantial question of general importance such as that presented by the case at bar lower courts should not be left unguided except by an ambiguous

dictum of this Court,—a dictum which, as petitioner believes, the lower court has here misinterpreted.

The outstanding text authority has pointed out that on theory and logic § 7(c) of the Trading with the Enemy Act cannot be interpreted as barring a suit for just compensation.

See Domke, *The Control of Alien Property*, p. 163 (1947):

> "*A suit for just compensation* * * * *is directed to pecuniary redress rather than to restoration of the property* vested by the Custodian under the Tucker Act, 24 Stat. 505 (1887), 28 U. S. C. secs. 41 (20), 250. *Such a remedy is barred neither by the provision of sec. 7(c) (4) of the Trading with the Enemy Act* nor by sec. 153 of the Judicial Code, 28 U. S. C. sec. 259, which denies jurisdiction (to the Court of Claims) over claims 'growing out of or dependent on any treaty stipulation', inasmuch as such a suit may be based upon the violation of a constitutional right under the Fifth Amendment to the Constitution (taking of property without compensation.)"

The distinction pointed out by Mr. Justice Edgerton and by Domke was apparently recognized as the correct one in *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C. 1949), where the court thus expressed its ruling (at 651):

> "Section 9(a) of the Act provides the only judicial remedy *for a return*, all others being precluded by Section 7(c). * * * Section 7(c) limits the means *of reclaiming seized property* to the 'relief or remedy' provided by the Act itself. Section 9(a) provides the only judicial remedy *for reclaiming vested property.*"

Similarly, in *Draeger Shipping Co., Inc.* v. *Crowley*, 49 F. Supp. 215 (D. C. S. D. N. Y. 1943), the court, in holding that the suit was properly before it, expressly noted (at 218-219):

> "* * * this suit was brought in equity chiefly for an injunction against liquidation *and not for compensation.*"

In the foregoing Court of Appeals and District Court cases, the courts have recognized the distinction pointed out by Mr. Justice Edgerton and by Domke between "a claim to the property" and "a claim to compensation for the taking of property."

Point IV

The opinion below analyzes erroneously the three prior Court of Claims cases dealing with this problem.

The opinion below discusses three prior Court of Claims cases dealing with this problem (R. 7-10). With all due respect to that court, it must be said that the court below has misread its own prior decisions on this subject.

In *North German Lloyd* v. *United States*, 61 C. Cls. 138 (1925), cert. den. 270 U. S. 645, 70 L. Ed. 778 (1926), the material fact was that plaintiff was a German corporation—an alien enemy. Consequently, the Court of Claims there rejected plaintiff's contention that it had a right to assert a claim under the Constitution of the United States, stating (at 140-141):

> "The fifth amendment to the Constitution provides: 'Nor shall private property be taken for public use, without just compensation.' *An examination of this amendment must cause one to conclude that its provisions apply to citizens of the United States, and not to alien enemies in time of war.* If it were otherwise the war powers conferred upon Congress by the Constitution would be rendered nugatory and the Government would be placed in the attitude of being obliged to pay to its alien enemies money which could be used for its own destruction."

The Court of Claims further noted that the special act of Congress under which the property of the North German Lloyd—an alien enemy—had been seized, contained express provision for determination of any claim made by said

alien enemy for compensation for the taking of its property. The Court of Claims accordingly held (at 142):

> "As Congress did not provide any other form for the determination of the compensation except that it should be determined by the President, and *as the property in question is the property of an alien enemy taken in time of war* under the provisions of a statute passed for that purpose, it follows that under circumstances such as these no implication arises of a contract of which this court can take jurisdiction * * *."

The opinion below cites the *North German Lloyd* case as authority for its position that the Court of Claims does not have jurisdiction of the claim of *an American citizen* for just compensation for property seized by the Alien Property Custodian (R. 8-9), and the opinion below further observes (R. 9):

> "It is true that *North German Lloyd* v. *United States, supra,* involved an enemy corporation of Germany * * * but in the consideration of the existence of jurisdiction in this court to hear and determine suits under the relevant sections of the statute involved we are of the opinion that such distinction is not relevant for the reason that Congress plainly did not make it so when it accorded the privilege to sue the Government."

It may well be that no distinction *should* have been drawn between a German corporation and an American citizen in 1925, but the Court of Claims most decidedly *did* draw such a distinction in that year.

In the *North German Lloyd* case the Court of Claims wrote a five-page opinion which was primarily dedicated to a demonstration that an alien enemy does not stand in the same position as an American citizen with respect to the right to come into the Court of Claims to seek compensation for property seized by the government in time of war.

It would seem that if the Court of Claims had, in 1925, been of the opinion that *neither* an alien enemy *nor* an American citizen had the right to come into that court to seek compensation for such seizure, that court would not have taken pains to expound fully, as it did, the difference in status between an alien enemy and an American citizen, but would merely have ruled—with expedition and with clarity—that *nobody* may come into the Court of Claims to seek compensation for property seized by the government in time of war.

The fact is that—rightly or wrongly—jurisdiction of the claim asserted by plaintiff in the *North German Lloyd* case was rejected *because plaintiff was an alien enemy.* It is being somewhat less than candid for the Court of Claims to cite that case now as authority for the proposition that it does not have jurisdiction of the claim of an American citizen to recover just compensation for property seized by the government in time of war, and to justify such citation by asserting that Congress plainly did not intend that any distinction be drawn between an alien enemy and an American citizen.

In *Escher* v. *United States,* 68 C. Cls. 473 (1929), cert. den. 281 U. S. 752, 74 L. ed. 1163 (1930), the Court of Claims was again dealing with non-citizens; in that instance, Swiss citizens.

To plaintiffs' contention that if § 7(c) of the Trading with the Enemy Act limited plaintiffs' relief to a suit under that Act, then it was unconstitutional, the Court of Claims replied (at 478):

> "* * * in connection with the claim that the statute is unconstitutional, it should be noted that the plaintiffs are not citizens of the United States."

It will thus be observed that in 1929, as in 1925, the Court of Claims once more predicated its determination upon a

differentiation which it stated exists between a non-enemy alien and an American citizen.

Subsequent cases in this Court have indicated that the distinction drawn by the Court of Claims in the *Escher* case between a non-enemy alien and an American citizen is not one which would govern in a similar situation today. But regardless of the present state of the law in that respect, it is to be observed that the Court of Claims did *not* determine the *Escher* case upon the ground that *nobody* may come into the Court of Claims to seek compensation for seizure of his property by the Alien Property Custodian.

The Court of Claims *expressly* ruled in the *Escher* case that plaintiff's contention that if the Trading with the Enemy Act denied to them relief in the Court of Claims then it was unconstitutional, was a position which could not be maintained since plaintiffs were not citizens of the United States.

The opinion below cites the *Escher* case—as it does the *North German Lloyd* case—as authority for its position that the Court of Claims does not have jurisdiction of the claim of *an American citizen* for just compensation for property seized by the Alien Property Custodian (R. 7-8), and the opinion below further observes (R. 9):

> "It is true that * * * *Escher* v. *United States, supra,* involved a citizen of Switzerland, but in the consideration of the existence of jurisdiction in this Court to hear and determine suits under the relevant sections of the statute involved we are of the opinion that such distinction is not relevant for the reason that Congress plainly did not make it so when it accorded the privilege to sue the Government."

Perhaps the Court of Claims was in error in 1929, and is correct now in its statement that no distinction should be drawn between a non-enemy alien and an American citizen with respect to the right to sue the government, but it most

decidedly *did* draw that distinction in 1929. It predicated its decision in 1929 upon that supposed distinction, and it now seeks to utilize that decision as authority for its present decision against an American citizen, explaining that no differentiation ever should have been made.

It is to make a mockery of every principle of logic and of reasoning for a court first to decide that "A" may not recover because he is not "B", and then to cite such holding as authority for the proposition that "B" may not recover because no distinction should be drawn between "A" and "B".

It will thus be seen that in both the *North German Lloyd* case and the *Escher* case the Court of Claims rejected jurisdiction, not upon the ground that *nobody* could sue in that court for compensation for property seized by the government in time of war, but upon the *express* ground that the plaintiffs in those cases were not American citizens.

If any inference is to be drawn from what the Court of Claims said and what it did not say in those two cases, the logical and reasonable inference is that the Court of Claims was taking pains to draw a distinction because it thought that the distinction was vital.

If the Court of Claims has since been persuaded that the distinction which it drew in those two cases was erroneous, then those two cases may have ceased to be authority for the propositions therein expounded, but they have not automatically become authority for the proposition that the Court of Claims does not have jurisdiction to award just compensation for the seizure of property of an American citizen by the Alien Property Custodian.

With respect to *Castell* v. *United States,* 83 C. Cls. 222, 14 F. Supp. 654 (1936), which was urged upon the Court of Claims by petitioner in his briefs below, the principal comment of the opinion below is that "no question of the jurisdiction of this court was involved" in that case (R. 9).

It is true that the jurisdiction of the Court of Claims was not directly involved in the *Castell* case, but the same principles which were determinative of the problem involved in the *Castell* case are determinative of the problem involved in the case at bar. The facts and the opinion in the *Castell* case were rather complicated, but they merit study.

In the *Castell* case, plaintiff was the executor of an American citizen, whose property, which had been seized by the Alien Property Custodian, was ordered returned to her by decree of the Supreme Court of the District of Columbia. Thereafter, the Commissioner of Internal Revenue declined to pay her interest on the refund of an overpayment of income taxes which had been made for her account by the Alien Property Custodian. Such refusal was based on the ground that § 24(e) of the Trading with the Enemy Act prohibited payment of interest on income tax refunds in the case of property seized under said Act.

The Court of Claims there held (at 230):

> "* * * it would be extraordinary if a loyal citizen of the United States whose property had been seized and who had undergone the misfortune of having it withheld from him for a long period should, when the Government had already done him an injury for which he could recover no damages, be still further injured by being denied *the benefits of statutory provisions to which he would have been entitled if the Government had not assumed the custody of his property.* Obviously no good reason can be given why he should be so treated nor why Congress should have intended such a result."

Accordingly, the Court of Claims held that the provisions of § 24(e) of the Trading with the Enemy Act were inapplicable to an American citizen whose property

had been "mistakenly seized" by the Alien Property Custodian in the belief that she was an enemy. It must follow that any other limitation contained in the Trading with the Enemy Act which purports to restrict the remedy of an American citizen whose property has been "mistakenly seized" in the belief that he was an enemy is equally inapplicable.

Since the government's demurrer herein admits that plaintiff is a loyal American citizen, no differentiation or discrimination may legitimately be practiced against him, so as to deny to him rights which are available to other loyal American citizens. The fact that his property has been seized by the Alien Property Custodian under a misapprehension does not justify discrimination against him, so as to deny to him that access to the Court of Claims which is granted to other loyal American citizens.

In the foregoing connection, the Court of Claims, in the *Castell* case, held (at 233-234):

> "In determining this question it must not be forgotten that the plaintiff's intestate was not an alien enemy but a loyal citizen and, as said by Mr. Justice Holmes in *Escher* v. *Woods, supra* [281 U. S. 379], the property was 'mistakenly seized' and the possession acquired was one 'that the law requires him [Alien Custodian] to surrender.' * * *
>
> "It must be conceded that the Government * * * may discriminate * * * but the classification made for such purposes must be reasonable and it would seem that to allow interest to loyal citizens whose property had not been seized and deny it to those whose property had been seized would be an arbitrary and capricious discrimination. If we are correct in this, it furnishes an additional reason for holding that Congress did not so intend."

By the same reasoning, it follows that where the property of a loyal American citizen has been "mistakenly

seized'' by the Alien Property Custodian, no asserted limitation which is not *completely unambiguous* can operate to abrogate a right previously *expressly conferred* on such citizen.

By no stretch of the imagination can § 7(c) of the Trading with the Enemy Act be said to constitute a completely unambiguous abrogation of the right previously conferred upon loyal American citizens to sue in the Court of Claims for seizure of their property by the government.

The right to sue in the Court of Claims to recover just compensation for property seized by officers of the government, which has been expressly conferred on all loyal American citizens, has not been *unambiguously withdrawn* from those loyal American citizens whose property is ''mistakenly seized'' in the belief that they are enemies.

As was pointed out by the Court of Claims in the *Castell* case, the arbitrariness and capriciousness of discriminating between seizure of property of a loyal citizen who is recognized to be loyal, and seizure of property of a loyal citizen who is mistakenly believed to be disloyal, furnish ''an additional reason for holding that Congress did not • • • intend'' such discrimination.

The authorities cited in Point III, *supra*, demonstrate that Congress clearly did not intend such discrimination. By §§ 7(c) and 9(a) of the Trading with the Enemy Act all that Congress sought to do was to afford to loyal citizens whose property had been ''mistakenly seized'' by the Alien Property Custodian the *additional remedy* of securing the return of the property itself. Congress never sought to abrogate the remedy of just compensation which had previously been accorded to loyal citizens whose property had been seized by officers of the government in supposed pursuance of their official duties.

It was not the intention of Congress that in the hypothetical case of the decayed fish propounded in "Summary of the Argument," *supra*, a loyal American citizen's recovery was to be limited to 1% of the value of that which had been "mistakenly seized."

Conclusion

The Alien Property Custodian, acting under a misapprehension, in purported compliance with the Trading with the Enemy Act, has taken from plaintiff property of a value of more than $1,000,000, for which the government has failed and refused to make any compensation. Plaintiff is a loyal American citizen. Under the Fifth Amendment to the Constitution and 28 U. S. C. § 1491, plaintiff is entitled to seek just compensation in the Court of Claims for such taking.

Section 7(c) of the Trading with the Enemy Act did not purport to deprive the Court of Claims of the jurisdiction previously conferred on it by statute in compliance with the constitutional mandate, since § 7(c) confers exclusive jurisdiction on the District Courts only of the *additional remedy* of a suit *for the return of the property itself*.

Many authorities have analyzed and approved of the distinction hereinbefore drawn between the remedy of return of the property itself and the remedy of just compensation for seizure of the property. Aside from the determination below, no authority has ever rejected that distinction.

But regardless of this Court's ultimate determination on the question here presented, the granting of certiorari is clearly warranted by (1) the inconsistent position heretofore taken by the government in the very case at bar, (2) the fact that scores of eminent government counsel have, in a vast number of cases, urged a view contrary to

that adopted by the court below, and (3) the fact that the determination of the court below was predicated, in large part, upon misinterpretation of a prior decision of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 251

WALTER H. DUISBERG, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 5–12) is reported at 89 F. Supp. 1019.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 12). The petition for a writ of certiorari was filed on August 16, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether Section 9 (a) of the Trading With the Enemy Act provides the sole remedy available

The petition, filed in the court below on June 29, 1948, sought to recover $1,283,750 together with interest as just compensation for the alleged taking of his stock. The motion to dismiss was based on the grounds (a) that the court lacks jurisdiction, and (b) that petitioner's claim is barred by the dismissal of petitioner's prior action with prejudice (R. 4). The motion was granted, the court below holding that it lacks jurisdiction. The court did not reach the question of election of remedies and *res judicata* (R. 12).

ARGUMENT

In seeking review of the holding below, that Section 9 (a) of the Trading With the Enemy Act provides the sole remedy available to a citizen for property mistakenly seized by the Alien Property Custodian under the Act, petitioner contends that the court below misinterpreted the decision and opinion of this Court in *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (Pet. 5–6, 10, 17–20). He concedes that if the Court has already decided the question here presented adversely to petitioner in the *Uebersee* case, "then manifestly certiorari should be denied" (Pet. 10). As we read the *Uebersee* case, it holds, in full accord with this Court's earlier decisions, that Section 9 (a) is the only remedy Congress has granted a non-enemy. Accordingly, there is no occasion for further review by this Court.

Even assuming *arguendo,* however, that our reading of the *Uebersee* case is incorrect, the question which petitioner seeks to raise need not here be decided since the motion to dismiss is independently sustainable under the doctrines of election of remedies and *res judicata.*

1. As originally enacted, the Trading With the Enemy Act authorized the seizure of property of "an enemy or ally of enemy" (Section 7 (c)).[2] It further provided that "the sole relief and remedy of any person having any claim to any money or other property" transferred to or seized by the Custodian "shall be that provided by the terms of this Act" (Section 7 (c)), and authorized "any person not an enemy or ally of enemy" to bring a suit in equity to "establish any right, title, or interest which he may have" in any property held by the Alien Property Custodian (Section 9 (a)). If the claimant established such an interest, the court was directed to order the payment or transfer to him of the "money or other property * * * or the interest therein to

[2] Those terms were defined in Section 2 of the Act. In substance, an enemy was defined as any person (regardless of nationality) resident (or incorporated) in enemy territory; or resident (or incorporated) outside the United States and doing business within enemy territory. An "ally of enemy" was defined as any person (regardless of nationality) resident (or incorporated) in the territory of any nation which is the ally of an enemy nation; or resident (or incorporated) outside the United States and doing business within such territory.

which the court shall determine said claimant is entitled" (Section 9 (a)).

On its face, therefore, the Act plainly provided that where property had been mistakenly seized by the Alien Property Custodian in the belief that it belonged to "an enemy or ally of enemy," the sole relief afforded by Congress was that authorized in the Act. And the courts have consistently so stated. *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 568; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 79; *Propper* v. *Clark,* 337 U. S. 472, 483–484; *Sigg-Fehr* v. *White,* 285 Fed. 949, 954 (C. A. D. C.); *Pflueger* v. *United States,* 121 F. 2d 732, 734–735 (C. A. D. C.), certiorari denied, 314 U. S. 617; *McGrath* v. *Zander,* 177 F. 2d 649, 651 (C. A. D. C.); *Escher* v. *United States,* 68 C. Cls. 473, certiorari denied, 281 U. S. 752; *Ruoff* v. *McGrath* (D. D. C.), motion for leave to file petition for mandamus denied sub nom. *Ruoff* v. *McLaughlin,* 339 U. S. 930.[3]

In upholding the validity of an exclusive remedy limited to the recovery of the property

[3] See also *Von Bruning* v. *Sutherland,* 29 F. 2d 631, 632 (C. A. D. C.); *Crone* v. *Sutherland,* 63 F. 2d 895, 896 (C. A. D. C.); *Becker Steel Co.* v. *Cummings,* 95 F. 2d 319, 320 (C. A. 2), certiorari denied, 305 U. S. 604; *Cummings* v. *Hardee,* 102 F. 2d 622, 627 (C. A. D. C.), certiorari denied, 307 U. S. 637; *Josephberg* v. *Markham,* 152 F. 2d 644, 649 (C. A. 2); *United States* v. *The Antoinetta,* 153 F. 2d 138, 143 (C. A. 3), certiorari denied, 328 U. S. 863; *Clark* v. *Tibbetts,* 167 F. 2d 397, 401 (C. A. 2); *Koehler* v. *Clark,* 170 Fed. 779, 780 (C. A. 9); *North German Lloyd* v. *United States,* 61 C. Cls. 138, 143, certiorari denied, 270 U. S. 645; *Draeger Shipping Co.* v. *Crowley,* 49 F. Supp. 215, 218 (S. D. N. Y.).

seized or its proceeds this Court pointed out that Congress, in authorizing the seizure of property as a war measure, "did not attempt the confiscation of the property of citizens or alien friends." *Becker Steel Co.* v. *Cummings,* 296 U. S. at 79. Whereas alien enemies were divested of every right or interest in the money or property seized by the Custodian (*Cummings* v. *Deutsche Bank,* 300 U. S. 115, 120),[4] the seizure of the money or property of those not "an enemy or ally of enemy" was merely a possessory taking. *Central Trust Co.* v. *Garvan, supra* at 566, 569. For such cases, the constitutionally appropriate remedy was to undo the seizure so far as possible by providing for the return of the property or its proceeds by administrative action or suit under Section 9 (a) and by requiring that it be kept by the Custodian while such suit was pending. To have allowed recovery by way of just compensation would have been to ignore the requirement of an authorized taking as a condition of such recovery, and to treat the United States either as an involuntary purchaser of property which Congress had not authorized the Custodian to retain but had rather directed him to return, or else as liable for damages arising from a purely possessory taking of property which the claimant could have

[4] Enemy property may constitutionally be confiscated. *Miller* v. *United States,* 11 Wall. 268, 306; *United States* v. *Chemical Foundation,* 272 U. S. 1, 11.

recovered at any time by proceeding under Section 9 (a).[5]

Accordingly, it was well established prior to the *Uebersee* case that the remedy afforded by the Act was exclusive and constitutionally adequate. Nothing in this Court's decision in *Uebersee* purports to upset that settled rule. Indeed, as we read the *Uebersee* opinion, the Court's disposition of the particular question before it was grounded on that construction of the Act. That question was whether the amendment of Section 5 (b) of the Act by the First War Powers Act of 1941, 55 Stat. 838, 50 U. S. C. App. 5 (b), precluded suit under Section 9 (a) by an alien friend. As amended, Section 5 (b) authorized the vesting of "any property or interest of any

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[5] It should be noted in this connection that when the United States creates rights in individuals against itself, it is under no obligation to provide a remedy in the courts. As this Court announced in *Lynch* v. *United States*, 292 U. S. 571, 581–582:

"* * * For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. * * * The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, * * * and to those arising from some violation of rights conferred upon the citizen by the Constitution. * * *. * * * For immunity from suit is an attribute of sovereignty which may not be bartered away."

foreign country or national thereof."[6] Although the type of property subject to vesting was thus enlarged from "enemy" property to "foreign" property, Congress left Sections 7 (c) and 9 (a) unchanged. Since Section 9 (a) authorized "any person not an enemy or ally of enemy" to bring suit, it was argued that the objectives of the amendment of Section 5 (b)[7] would be destroyed

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[6] Section 5 (b) (3) authorizes the President "to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision." Pursuant to such authority, the President has defined a foreign national as follows (Executive Order 8389, 5 F. R. 1400, as amended, 6 F. R. 2897, 2898):

"(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.

"(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined.

"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, * * *."

[7] In construing the Trading With the Enemy Act, as originally enacted, this Court had held in *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, that a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation, or any of its allies, could maintain suit under Section 9 (a) even though the corporation was

unless Section 9 (a) were deemed to have been constructively amended so as to exclude suits by foreign nationals. It was this problem which faced the Court in the *Uebersee* case.

Both parties in the *Uebersee* case premised their argument on the proposition that Section 9 (a) provides the sole remedy granted by Congress to those whose property was not intended to be taken. Respondent's position was that Congress did not intend by the amendment of Section 5 (b) to authorize vesting of the property of alien friends; the Alien Property Custodian, disagreeing as to this, contended that Section 9 (a) must be deemed constructively amended so as to preclude return to "any person not an enemy or ally of enemy or national of any foreign country." To save the constitutionality of his position, the property of alien friends being constitutionally protected from uncompensated taking (cf. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489), the Custodian suggested that the *authorized* taking of the property of an alien friend would give rise to an implied promise to pay just compensation which might form the basis

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enemy owned or controlled. By the outbreak of World War II, it had become notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral. The 1941 amendment of Section 5 (b) was designed to reach enemy interests which masqueraded under those innocent fronts. See *Clark* v. *Uebersee Finanz-Korp., supra,* at 483–485.

of a suit against the United States in the Court of Claims or the appropriate District Court under the Tucker Act (28 U. S. C. (1946 ed.) 41 (20), 250 (1)). Such remedy, it was contended, did not conflict with the command of Section 7 (c) that "the sole relief and remedy of any person having any claim to any money or other property" transferred to or seized by the Custodian "shall be that provided by the terms of this Act." Since Section 5 (b) authorized the taking of the property of foreign nationals, respondent, as a foreign national, had no claim to the property seized. This construction, the Custodian argued, would not render Section 7 (c) meaningless, since it would remain fully applicable to one whose property had been seized in the mistaken belief that it was owned, or controlled, by a foreign national. In other words, in the Custodian's view, Section 9 (a) remained the exclusive remedy in cases where the taking and retention of the property was not authorized by Congress; the remedy of just compensation would be available only where the taking was authorized and return was precluded.[8]

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[8] See pp. 54–63 and pp. 8–29 of petitioner's and respondent's briefs, respectively, in *Clark* v. *Uebersee Finanz-Korp.*, No. 35, October Term, 1947.

In this connection, it should be pointed out, although we think it irrelevant to the granting of certiorari *vel non*, that petitioner's assertion that "the government has maneuvered petitioner into his present unhappy situation by previously taking the position in other courts [prior to this Court's decision in the *Uebersee* case] that petitioner *does* have a remedy under the Tucker Act" (Pet. 11) is inaccurate. The government has never taken the position, for which petitioner

The Court rejected even this limited contention that the remedies stated in the Act could be sup-

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is here contending, that the Tucker Act remedy was an alternative available in cases in which the remedy of Section 9 (a) was also available. As in the *Uebersee* brief filed by the government, the government had (~~primarily~~) suggested the availability of a Tucker Act remedy to the exclusion of suit under Section 9 (a) in those cases where the property allegedly was that of a foreign national as defined by the Act (note 6, *supra*, p. 9), and the claimant was one who is constitutionally protected from uncompensated taking. This position became meaningless after this Court, in the *Uebersee* case, held that the remedy of Section 9 (a) was available to a foreign national who had no enemy taint—*i. e.*, that it was available to all those whose property was constitutionally protected from confiscation.

In support of his contention that the government has been inconsistent, petitioner has set forth part of a brief filed by the government in the antecedent action brought by petitioner under Section 9 (a) in the District Court for the District of New Jersey (*supra*, p. 3) (Pet. 11–13). When the brief is placed in its proper setting, no inconsistency is revealed. That brief was submitted in support of a motion to dismiss on the ground that suit would not lie under Section 9 (a) because of petitioner's failure to allege affirmatively that he is not a foreign national within the meaning of the Act. Since petitioner had alleged that he is a citizen, and thus was protected from uncompensated taking even though a foreign national as defined by the Act, the government suggested that the appropriate remedy was a suit for just compensation under the Tucker Act. The District Court held that petitioner's allegation that he is a citizen and the sole and absolute owner of the shares vested by the Custodian constituted a denial that petitioner is a foreign national as defined by the Act, and denied the motion. *Duisberg* v. *Crowley*, 54 F. Supp. 365. It should further be noted that, contrary to the implication to that effect conveyed by the petition, this motion, and the government's brief in support thereof, had no connection with the subsequent dismissal of petitioner's suit for want of prosecution.

plemented by an implied remedy of just compensation for an authorized taking of property of alien friends. It found no suggestion in the legislative history of the amendment that Congress intended the seizure and retention of the property of alien friends, and accordingly held that Section 9 (a) permits suit by foreign nationals free of enemy taint. In so holding the Court observed that (282 U. S. at pp. 487–488):

> * * * It is hard for us to assume that Congress adopted that drastic course in the case of friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control. Our hesitation is, moreover, increased when we note that § 7 (c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment.

Petitioner herein, pointing to the language just quoted, asserts that the Court thereby recognized that a Tucker Act remedy may be implied despite the language of Section 7 (c) (Pet. 19).

When the language is read in its context, however, we think it plain that the Court was referring only to the custodian's contention that a Tucker Act remedy should be implied, a contention made as part of a larger contention which the Court rejected. In holding that Congress did

not authorize the Custodian to retain the property of alien friends and that such alien friends were permitted to sue under Section 9 (a), it is hardly to be supposed that the Court intended *sub silentio* to overrule the well settled doctrine that Section 9 (a) provides the exclusive remedy and is constitutionally adequate. Indeed, to have held that a remedy under the Tucker Act for just compensation is also available would have been inconsistent with the Court's conclusion that Congress had no intention of seizing and retaining the property of alien friends, and to treat the United States as the involuntary purchaser of property which Congress had not authorized the Custodian to retain.[9] That our reading of the *Uebersee* opinion is correct is, we believe, substantiated by this Court's subsequent citation of the *Uebersee* case for the proposition that "When the Custodian vests blocked property, title passes to the Custodian and his authority to vest and hold

[9] It is pertinent to note that the opinion of the Court of Appeals for the District of Columbia Circuit in the *Uebersee* case, which this Court affirmed, expressly declared that (158 F. 2d 313, 314): "* * * appellant's right of recovery, if it has any, is limited by statutory terms to a suit under Section 9 (a), for only to that extent and in that manner has the United States consented to be sued. *Pflueger* v. *United States*, 73 App. D. C. 364, 121 F. 2d 732, certiorari denied, 314 U. S. 617, 62 S. Ct. 98, 86 L. Ed. 497; *Sigg-Fehr* v. *White*, 52 App. D. C. 215, 285 F. 949." The dissenting opinion of Justice Edgerton, stating that a Tucker Act remedy was available to the exclusion of suit under Section 9 (a), was based on the theory, rejected by this Court, that Congress had authorized the taking of the property of all foreign nationals.

cannot be questioned except as provided in the Trading With the Enemy Act." *Propper* v. *Clark,* 337 U. S. 472, 483–484; *Cf. McGrath* v. *Manufacturers' Trust Co.,* 338 U. S. 241, 246.[10] We submit, therefore, that the decision below is clearly correct and further review is not warranted.

2. Assuming *arguendo,* however, that petitioner has the election of proceeding under the Tucker Act in the Court of Claims or under Section 9 (a), the present proceeding is barred because of the dismissal of petitioner's antecedent action with prejudice for failure of prosecution (*supra,* p. 3). It is a familiar principle that a suitor who pursues a choice of inconsistent remedies is bound by his election even if the remedy chosen be not efficacious. Cf. *United States* v. *Oregon Lumber Co.,* 260 U. S. 290. We think it obvious that the two suits are inconsistent. Whereas an action brought under Section 9 (a) for the return of the property proceeds on the theory that the claimant is entitled to the property and that Congress did not authorize the Alien Property Custodian to retain the property mistakenly taken by him, an action under the Tucker Act for just compensation lies on the theory that the taking is authorized and that title remains in the United States. Moreover, apart from the doctrine of election of remedies, the instant action is barred

[10] See also *McGrath* v. *Zander; Ruoff* v. *McGrath; Clark* v. *Tibbetts; Koehler* v. *Clark,* cited *supra,* p. 6.

by *res judicata.* Rule 41 (b) of the Federal Rules of Civil Procedure provides that "for failure of the plaintiff to prosecute * * * a defendant may move for dismissal of an action or of any claim against him. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision * * * operates as an adjudication upon the merits." Since petitioner's prior action was dismissed with prejudice under Rule 41 (b), that dismissal was an adjudication on the merits which precludes a suit for just compensation. Cf. *Escher* v. *United States,* 68 C. Cls. 473, certiorari denied, 281 U. S. 752. *Reading* v. *Atchison, T. & S. F. Ry. Co.,* 7 F. R. D. 664 (N. D. Ill.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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NOVEMBER 1950.

APPENDIX

Sections 5 (b), 7 (c) and 9 (a) of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 5 (b), 7 (c), 9 (a), provide in pertinent part as follows:

> § 5 (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> * * * * *
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered,

liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *.

§ 7 (c) If the President shall so require any money or other property * * * and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

§ 9 (a) Any person not an enemy or ally of enemy claiming any interest, right,

or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corpora-

> tion, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Rule 41 (b) of the Federal Rules of Civil Procedure provides:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground

that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 251

WALTER H. DUISBERG,

Petitioner,

v.

THE UNITED STATES.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Respondent moved in the court below to dismiss the petition therein on the grounds of (1) lack of jurisdiction, (2) legal insufficiency, and (3) *res judicata.*

Upon the argument of its motion, respondent did not press ground "2". In addition to grounds "1" and "3", respondent urged dismissal upon the ground of election of remedies.

The court below dismissed the petition on the ground of lack of jurisdiction. With respect to the other two grounds which had been presented to it, the court below stated only (R. 12):

> "Having concluded that this court lacks jurisdiction to entertain this suit, it is not necessary for us to consider the doctrines of *res judicata* and election of remedies which the parties ably presented in their briefs."

Since the court below made no determination adverse to petitioner on those two questions, petitioner was in no position to urge error with respect thereto as ground for certiorari. Petitioner's supporting brief was consequently silent thereon.

Respondent has now opened up those two questions in this court. No criticism of respondent is implied in pointing out that thereby the possibility has arisen that some Justice of this court who may be of the opinion that certiorari should be granted on the point actually determined below might decline to grant it because of a belief that the determination below was correct on some other ground not considered by the lower court.

Respondent presents its argument with respect to both of those questions in only one paragraph (Br. 15-16). The thoroughness of treatment which they should receive in this reply brief presents a delicate problem. Although casually raised, these new issues must be met. This cannot be adequately done without extended analysis, for which petitioner craves this court's indulgence.

POINT I

Respondent has failed to meet petitioner's arguments on the issue of jurisdiction.

Petitioner's main brief presented four grounds why a writ should be granted to review the lower court's disclaimer of jurisdiction, to wit:

(1) The inconsistent position heretofore taken by the government in the very case at bar upon that question;

(2) The position that the lower court has jurisdiction of a claim such as that at bar heretofore taken in many other cases by experienced, intelligent and sincere government counsel;

(3) The dictum of this court in the *Uebersee* case and the opinions expressed by other authorities recognizing the lower court's jurisdiction to entertain the claim at bar; and

(4) The erroneous analysis in the opinion below of the three prior Court of Claims cases dealing with this problem.

The opposing brief disposes of those four points as follows:

(1) Respondent's brief ignores petitioner's Point I in its text, but refers to it glancingly in one paragraph of a footnote at the base of page 12.

(2) Respondent's brief ignores petitioner's Point II in its text, but refers to it glancingly in one paragraph of a footnote at pages 11-12.

Respondent's footnote purports to explain away all of the authorities cited in petitioner's Point II as being cases where the property belonged to a friendly alien, and not to an American citizen (Br. 12). That this casual treatment of the Point is unwarranted becomes manifest upon consideration of the fact that in *Draeger Shipping Co., Inc.* v. *Crowley*, 49 F. Supp. 215 (D. C. S. D. N. Y. 1943), which was one of the cases cited in that Point, paintiff *was* an American citizen.

Although the plaintiff in that case clearly had available the remedy of suit under § 9(a), the Alien Property Custodian urged that the Court of Claims had jurisdiction to make compensation for the property which had there been appropriated for public use.

Consequently, respondent is lamentably in error when it offhandedly states in its footnote (Br. 11-12) that

> "*The government has never taken the position*, for which petitioner is here contending, that the Tucker Act remedy was an alternative available in cases in which the remedy of Section 9(a) was also available."

The government most decidedly *did* take that position in the *Draeger* case.

(3) Respondent's brief ignores all of the authorities cited in petitioner's Point III, except the *Uebersee* case. Respondent argues that this court's dictum in the *Uebersee* case indicates that the government is correct in its present position, but respondent does not challenge petitioner's contention that the ambiguity of this court's *Uebersee* dictum warrants certiorari so that this court may determine this important question and resolve the conflicting authorities.

(4) Respondent's brief completely ignores petitioner's Point IV, which demonstrated beyond possibility of contradiction that the court below had misread its own three prior decisions on this problem, which it cited in support of its decision herein. If respondent had had even a single word to say in support of the correctness of the lower court's citation of its three prior decisions, it may safely be presumed that respondent would have attempted to justify the lower court's citations.

POINT II

Petitioner's petition in the Court of Claims was not barred by the doctrine of election of remedies.

Respondent urges that "a suitor who pursues a choice of inconsistent remedies is bound by his election even if the remedy chosen be not efficacious" (Br. 15).

Respondent is in error both in urging that the remedies sought in the District Court action and in the Court of Claims action were inconsistent, and in urging that the institution and discontinuance or dismissal of a suit without trial constitutes an election so as to bar a party from enforcing another remedy, even if the two remedies be inconsistent.

A. The two suits did not seek inconsistent remedies.

Respondent's *complete* argument to the effect that the remedies sought in the District Court action and in the Court of Claims action were inconsistent reads (Br. 15):

> "We think it obvious that the two suits are inconsistent. Whereas an action brought under Section 9(a) for the return of the property proceeds on the theory that the claimant is entitled to the property and that Congress did not authorize the Alien Property Custodian to retain the property mistakenly taken by him, an action under the Tucker Act for just compensation lies on the theory that the taking is authorized and that title remains in the United States."

Respondent is in error in asserting that the one action recognizes title as vested in the United States whereas the other action does not.

It has been expressly adjudicated that *absolute title* to property seized by the Alien Property Custodian vests in the United States at the moment of seizure and that legal title thereto may be transferred by the United States to others. See:

> *United States* v. *Borax Consol., Ltd.*, 62 F. Supp. 220, 223 (D. C. N. D. Calif. 1945);
> *The Pietro Campanella*, 47 F. Supp. 374, 377 (D. C. D. Md. 1942).

Consequently it is clear from the authorities that both actions were predicated upon the fact that property of petitioner, an American citizen, had been seized by the Alien Property Custodian and that absolute title thereto had by such act been vested in the United States.

There was no difference in the facts which petitioner was required to prove in order to sustain the two suits. The only difference was in the remedies sought. In the first action, petitioner sought to reacquire the property. In the second action, petitioner sought just compensation for its taking. In neither suit did petitioner take a position inconsistent with that taken in the other.

To test the reasonableness of respondent's contention that it is *"obvious"* that the two suits were inconsistent, let us revert to the hypothetical decayed fish case presented in petitioner's main brief.

That hypothetical case was thus presented: The United States seizes a cargo of fresh fish which the Alien Property Custodian mistakenly believes to belong to an alien enemy, although it actually belongs to a loyal American citizen. At the moment of seizure the property is worth $10,000. A week later, when the property has declined to a value of $100 (as fertilizer), the Alien Property Custodian recognizes his error and returns the fish.

In petitioner's main brief it was urged that the owner has a claim to secure just compensation for the seizure, under the Fifth Amendment and 28 U. S. C. § 1491, and that the return of the fish, now worth only 1% of its value at the date of seizure, does not completely satisfy the obligation of the government under all applicable statutes. In short, that the remedy of return of the property itself, afforded by § 9(a) of the Trading with the Enemy Act, was not intended as a *substitute* for the pre-existing remedy of just compensation, but was intended as an *additional* remedy available to owners in those instances where their interests might be better served by compelling a return of the property itself.

Respondent's argument is, in effect, that if the owner in that hypothetical case commenced a suit for the return of his cargo of fish, but recognizing a week later that the return of the fish in their then decayed state would fail to make him whole, abandoned his suit for return under § 9(a) and commenced suit in the Court of Claims for just compensation, the two suits would be *"obviously"* inconsistent.

Respondent is proceeding on the fallacious assumption that *merely because a plaintiff may not recover twice for the same wrong,* suits seeking two different remedies for the same wrong are necessarily inconsistent. The true test of inconsistency is whether, in order to sustain one of the

suits, plaintiff must allege and prove facts which he would be required to disprove in the other suit.

In analyzing this problem, it is appropriate to note that the doctrine of election of remedies is one that is not favored by the courts and is to be applied only where its application is inescapable. See *Friederichsen* v. *Renard,* 247 U. S. 207, 62 L. ed. 1075 (1918), where this court stated (at 213):

> "At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended."

In view of the utter inapplicability of the doctrine of election of remedies to the situation at bar, petitioner will cite only a few cases which illustrate the non-application of the rule in situations analogous to that at bar.

In *Whitney* v. *Parish of Vernon,* 154 S. W. 264 (Texas 1913), the court stated (at 267):

> "The doctrine of election of remedies applies in a case in which a plaintiff has the right to choose between two modes of redress which are so inconsistent that the assertion of one is necessarily a repudiation of the other. * * *
>
> "There is no inconsistency in the position assumed by appellant in seeking to recover upon a quantum meruit and in that assumed by him in his suit upon the contract. The pursuit of one of these remedies cannot be regarded as a repudiation of the other."

In *Abramson* v. *Leo,* 240 App. Div. 343, 269 N. Y. Supp. 814 (1934), plaintiff first instituted an action for rescission of an agreement, and then instituted an action for fraud resulting in the execution of the agreement. The court stated (at 357-358):

> "Assuming that plaintiff had such a remedy [for rescission], it is clear that it was wholly inadequate and that an action to recover damages for fraud was the proper remedy. * * *

> "The basis for both actions was fraud. The damages asked were damages because of a fraud, and there was no election for the reason that the plaintiff did not take an inconsistent position. [Cases cited.]"

Smith v. *Bricker,* 86 Iowa 285, 53 N. W. 250 (1892), presented the reverse of the preceding situation—plaintiff first instituted an action for fraud resulting in the execution of an agreement, and then instituted an action for rescission of the agreement. The court stated (at 290):

> "It is true, that a right to impeach a transaction on the ground of fraud may be lost by electing to affirm the contract. But in this case the action at law did not affirm the agreement in the sense that the plaintiff sought to take advantage of the contract. He demanded no more nor no less than he does in the petition in equity. He sought in one action, as in the other, to save himself from loss by reason of the voidable contract."

The instant situation is closely analogous to the above-cited cases, in which it was held that the remedies sought were entirely consistent. Both the suit in the District Court to recover the property itself and the suit in the Court of Claims to secure just compensation for its taking were predicated upon petitioner's contention that he, an American citizen, was the sole and absolute owner of the property seized by the Alien Property Custodian.

But even if the two proceedings had sought inconsistent remedies, the law is clear that the mere institution and failure to proceed with petitioner's first action in the District Court would not constitute such election of remedies as to bar maintenance of his subsequent petition in the Court of Claims.

B. The institution and discontinuance or dismissal of a suit without trial does not constitute such election of remedies as to bar a party from enforcing another remedy, even if the two remedies be inconsistent.

In *Register* v. *Carmichael,* 169 Ala. 588, 53 So. 799 (1910), plaintiff's first suit sought a dissolution of an alleged partnership with defendant and an accounting of its affairs. A receiver had been appointed in that suit and an appeal with respect thereto was still pending when plaintiff instituted her second suit to recover the purchase price of her interest in the partnership property, which she alleged she had sold to defendant. The court held that the institution of the first suit did not constitute an election of remedies, stating (at 590):

> "The theory of the appellant is that plaintiff was estopped to sue on the cause of action alleged, because she had elected by her bill in chancery to assert an antagonistic right. But an election, to be conclusive, must be efficacious to some extent at least. The mere bringing of a suit is not determinative of the right. The party against whom the estoppel is pleaded must have received some benefit under his election. [Cases cited.]"

In *Herdan* v. *Hanson,* 182 Calif. 538, 189 Pac. 440 (1920), plaintiff's first suit was for rescission of a contract; his second was for damages for fraudulent representations. The court held that the second suit might be maintained upon abandonment of the first, stating (at 541-543):

> "It is insisted, upon behalf of appellant, that a party having two inconsistent, concurrent remedies may not pursue both, but must choose between them and, having clearly elected to proceed upon one, is thereby bound and will be estopped from invoking the other. * * *
>
> "It is insisted, * * * upon behalf of appellant, that plaintiff's cause of action should be barred in the present case by his prior election of remedies, for the reason that the action for rescission failed not because plaintiff attempted to select a remedy to which he was not entitled, *but because of his own neglect in omitting to*

comply with the conditions prerequisite to the granting of the relief prayed for by him.

"The answer to this contention is that the principle of election is founded upon the theory that a party should not be allowed to occupy inconsistent positions (Bigelow on Estoppel, 6th ed., p. 732), whereas, *the effect of the judgment of nonsuit in the prior action was merely to leave the plaintiff and defendant in the same relative position as before the action was commenced.* * * *

"It follows that, inasmuch as the attempted prior election of the plaintiff was arrested and rendered abortive before he had proceeded to a point absolutely incompatible with the institution and maintenance of the present action, the principle of estoppel arising from an election of inconsistent remedies cannot be invoked and applied."

In *Gorman-Head Auto Co.* v. *Barrett,* 78 Okla. 34, 188 Pac. 1083 (1920), the court permitted maintenance of an action for the purchase price after a suit to rescind had been abandoned, stating (at 36):

"No rights were secured under the petition asking for cancellation, nor has the defendant been in any way damaged thereby."

In *First National Bank* v. *Flynn,* 190 Minn. 102, 250 N. W. 806 (1933), the court stated (at 105):

"We are now definitely in line with the view that mere commencement of an action or proceeding which, if carried to its usual conclusion would constitute an election, will not have that effect, assuming that the adverse party has not changed his position or been otherwise prejudiced. [Cases cited.]"

In *McMahan* v. *McMahon,* 122 S. C. 336, 115 S. E. 293 (1922), the court stated (at 342):

"When a certain state of facts under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, though they may not

be able to 'stand together' the enforcement of the one remedy being a satisfaction of the party's claim. In such case the invocation of the one remedy is not an election which will bar the other, unless the suit upon the remedy first invoked shall reach the stage of final adjudication, or unless by the invocation of the remedy first sought to be enforced the plaintiff shall have gained an advantage thereby or caused detriment or change of situation to the other."

Respondent's brief (p. 15) cites *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261 (1922), as purportedly standing for the proposition that the mere institution of a suit constitutes an election of remedies regardless of the further course of the litigation. The case does not stand for that proposition. This court therein affirmed the doctrine of the cases above cited, stating (at 297-301):

> *"The mere filing of the bill in the first suit, according to many authorities, did not constitute an irrevocable election.* But upon ascertaining from their plea that the defendants intended to rely upon the statute of limitations, and having knowledge of the facts upon which that plea was founded and thereafter sustained, the plaintiff in error had fairly presented to it the alternative: (a) of abandoning that suit and beginning an action at law * * * ; or (b) of proceeding with the original case upon the issues as they stood. The plaintiff in error deliberately chose the latter alternative. * * *
>
> "The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. * * * The plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and * * * it is now estopped from maintaining the present inconsistent action."

It will thus be seen that this court has *not* held that the mere institution of suit and subsequent motion by plaintiff for a voluntary nonsuit before trial constitutes an irrevocable election of remedies.

POINT III

Petitioner's petition in the Court of Claims was not barred by the doctrine of *res judicata.*

Respondent argues that, by virtue of Rule 41(b) of the Federal Rules of Civil Procedure, the dismissal of petitioner's District Court action *"was* an adjudication on the merits which precludes a suit for just compensation" (Br. 16).

Respondent's position is predicated upon a misunderstanding of the meaning of an order entered, under Rule 41(b), dismissing an action "with prejudice" although there has in fact been no trial upon the merits and no adjudication of any issue raised by the pleadings.

Res judicata is of two types: (1) that in which the subsequent action between the same parties or their privies is upon the same cause of action; and (2) that in which the second action between the same parties or their privies is upon a different cause of action. These two types are sometimes referred to as (1) *res judicata* of the case, and (2) *res judicata* of the issues.

Where the subsequent suit is upon the identical cause of action pleaded in the first, not only the issues which were *actually* tried and determined, but any which *could* have been tried and determined are deemed to have been adjudicated.

Where the subsequent suit is upon a different cause of action than the first, only those issues actually tried and determined are deemed to have been adjudicated.

If this distinction is kept in mind when Rule 41(b) is considered, it will be seen that this court, in promulgating

that rule, did not intend that its language should form the basis for a plea of *res judicata* of issues where the dismissal was before trial for failure to prosecute. In such case, where no proof has been introduced and no issues have been determined, it is patently impossible for any court to find *res judicata* of issues which may be presented in a subsequent action.

Rule 41(b) does *not* say that a dismissal without trial, unless the court otherwise specifies, *is* an adjudication on the merits. Rule 41(b) says that, unless the court otherwise specifies, a dismissal thereunder shall *"operate as"* an adjudication on the merits.

To have said that something that *is not* an adjudication on the merits *is* an adjudication on the merits would have been to say that black is white. This the rule did not do. The rule merely provides for certain consequences of the entry of an order thereunder, to wit, that further maintenance of *the suit thus dismissed* shall be as completely barred *as if* there had been an adjudication on the merits.

It does not follow therefrom that Rule 41(b) requires a court to treat a dismissal thereunder as if *the issues* pending before the court had actually been tried and adjudicated. The principles of *res judicata* neither require nor permit such consequences to flow from a dismissal "with prejudice" before trial.

In *Hughes* v. *United States*, 71 U. S. 232, 18 L. ed. 303 (1866), this court pointed out that in order for a judgment in one suit to constitute a bar to another suit, the judgment in the first suit must have been rendered on the merits. This court stated (at 237):

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, *and must be determined on its merits.* If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, *or was disposed of on any ground which*

> *did not go to the merits of the action,* the judgment rendered will prove no bar to another suit. [Cases cited.]"

The judgment of dismissal of the District Court action previously instituted by petitioner was upon a ground "which did not go to the merits of the action," and consequently it did not adjudicate any of *the issues* raised in the case at bar.

The record of the District Court action discloses that, although the issues of petitioner's American citizenship and of his sole and absolute ownership of the property in question were raised by the pleadings in that suit, those issues were not determined by the District Court, nor, in fact, did that court hear any evidence upon which it *could* have determined those issues (R. 2).

All that the District Court determined was that petitioner had disobeyed the court's direction that he proceed to present his evidence, and that in consequence he was to be penalized by being forbidden to maintain that suit or any other suit for the same relief [*the return of his property under § 9(a)*]. With respect to the substantive issues involved, petitioner was in no different position than if he had never commenced his suit and had never sought the return of his property, but had merely gone directly to the Court of Claims to seek compensation for its taking.

In support of its position that the dismissal "with prejudice" of petitioner's District Court action bars the maintenance of the instant action, despite the fact that there was no trial on the merits of the District Court action, respondent cites *Escher* v. *United States,* 68 C. Cl. 473 (1929), cert. den. 281 U. S. 752, 74 L. ed. 1163 (1930), and *Reading* v. *Atchison, T. & S. F. Ry. Co.,* 7 F. R. D. 664 (D. C. N. D. Ill. 1947). Neither case is in point.

In the *Escher* case, plaintiffs had *a full trial in the District Court to recover the value of their seized property, recovered judgment therein, and were paid the amount of the judgment obtained by them under § 9 of the Trading*

with the Enemy Act, after which they brought a second suit in the Court of Claims for the purpose of increasing their recovery. The facts in that case were patently dissimilar from the facts of the instant case, and the determination in that case is not authority for respendent's contention.

In the *Reading* case, the second action was commenced *for the identical relief, for the identical wrongs* complained of in the first action, which had been dismissed for want of prosecution. The holding therein that the second action falls within the ban of the rule of *res judicata of the case* is of no relevancy to the instant situation, where the problem involved is that of *res judicata of issues.*

It has been held that the provision of Rule 41(b) that a dismissal with prejudice shall "*operate as*" an adjudication on the merits is not the equivalent of saying that such a dismissal *is* an adjudication on the merits.

See *Russo* v. *Sofia Bros., Inc.,* 2 F. R. D. 80 (D. C. S. D. N. Y. 1941), where the court stated (at 81-82):

> "It is pointed out by Professor Moore that *the objective of the new rules is to secure a disposition of litigation on the merits* rather than by collateral methods. Rule 1, F. R. C. P., dictates that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. * * *
>
> "*Clearly, there has been no trial of the issues.* * * * In other words, *objectively considered, there has been no disposition of plaintiff's claim on the merits.* Are we constrained *by a fiction* to so treat it by the command of Rule 41?
>
> "I have searched vainly for a judicial interpretation of its language as it affects the problem here presented. The Notes of the Reporter to the Advisory Committee on the rules read: 'Note to subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.' * * *

> "The compilation of data gleaned from the Symposia on the Rules under the Auspices of the American Bar Association * * * reveal the Rule in its primary function, as a device during trial to prevent the recurrence of litigation that had reached that advanced stage.
>
> "The place that this rule occupies in the numerical order of the rules, as part of Chapter VI, entitled Trials, rules 38-53, tends to characterize it primarily as controlling the action at or after the trial.
>
> "To extend the operation of this rule to the instant motion would, I believe, *create a penalty and a forfeiture which was not contemplated by the framers of the Rules.*"

Any other ruling than that which was made in the foregoing case would raise the serious question as to whether this Court, in promulgating Rule 41(b), exceeded the authority vested in it by Congress under 28 U. S. C. § 2072, which provides:

> "Such rules shall not abridge, enlarge or modify any substantive right."

If the determination in the *Russo* case were to be rejected, there would be posed the question as to whether even this court has the power to promulgate a rule which provides that, merely for the purpose of controlling its calendar, a district court may deprive a party of his cause of action and thereby impose upon him a penalty out of all proportion to the damage done to the opposing party by the failure to prosecute and out of all proportion to the damage done to the judicial process by interference with its calendar.

If *anything* may be deemed to be fundamental in our judicial system it is that the right of a litigant to an adjudication upon the merits, despite any violation of court rules of which he may have been guilty, is a "substantive right."

No case has been found in which any court has determined whether Rule 41 (b), were it to be construed otherwise than as it was construed in the *Russo* case, would abridge peti-

tioner's "substantive rights" under the circumstances of the present situation. However, there have been a number of cases in which district courts have held that various other Rules of Civil Procedure abridge "substantive rights" and consequently are unenforcible despite the promulgation of such rules by this court. Among such cases are:

Francis v. *Humphrey*, 25 F. Supp. 1 (D. C. E. D. Ill. 1938);

Melekov v. *Collins*, 30 F. Supp. 159 (D. C. S. D. Calif. 1939);

Carby v. *Greco*, 31 F. Supp 251 (D. C. W. D. Ky. 1940).

The issue as to the power of this court to promulgate Rules 35 and 37 of the Rules of Civil Procedure came before this court in *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1, 85 L. ed. 479 (1941), where this court held that those rules do not abridge the "substantive right" of any litigant and consequently are valid. The significant feature of that case for present purposes is that this court recognized that even the fact that the rules were promulgated by the highest court itself does not bar inquiry into the validity of the promulgation of such rules when such question is subsequently raised *in an adversary proceeding.*

In view of the cogent reasoning in the *Russo* case, it is submitted that this court need never reach the question as to whether Rule 41(b), if otherwise construed, would unlawfully abridge petitioner's "substantive rights"; but were it necessary for this court to consider that problem, petitioner submits that there can be no question but that a court rule which declares that a dismissal without trial constitutes an adjudication upon the merits is an attempt to declare that black is white.

It constitutes an abridgement of "substantive rights" for a court to enact a rule that, as a punishment for a party's failure to proceed to trial, the dismissal of his action *shall be an adjudication upon the merits*, even

though in point of fact there has been no trial and *there has been no adjudication upon the merits.*

It is, therefore, clear that there has been no prior adjudication of petitioner's claim and that the defense of *res judicata* has been improperly raised.

CONCLUSION

Respondent has utterly failed to meet the argument presented by petitioner's main brief. Even if respondent were correct in its position that the Court of Claims does not have jurisdiction of the case at bar, the conflicting authorities and dicta on this subject, as well as the inconsistent position heretofore taken by the government both in the case at bar and in many other cases, demonstrate that this is a situation warranting certiorari so that this court may determine this important question.

The alleged defenses of election of remedies and of *res judicata* are without merit.

Regardless of this court's ultimate determination on the question here presented, the granting of certiorari is clearly warranted.

Respectfully submitted,

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